

NTSB Order No. EA-5224

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 2006

Respondent.

OPINION AND ORDER

¹ A copy of the initial decision, an excerpt from the hearing transcript, is attached.

Regulations (CFR) § 67.403(a)(1).² As further discussed below, we grant the Administrator's appeal and reverse the law judge's decision.

The March 22, 2006, emergency order of revocation alleged that respondent made intentionally false or fraudulent statements on 14 applications for medical certificates submitted between 1998 and 2006 in that he did not disclose required information on three different subjects: his May 5, 1994, conviction for "Refusal to Take Chemical Test" following a traffic stop; his hospitalization and associated follow-up medical care for injuries sustained in connection with a May 26, 2002, car accident; and a November 29, 2003, knee injury resulting in treatment by an orthopedic surgeon. Specifically, it was alleged that on all 14 applications respondent should have but did not disclose the traffic conviction in response to question 18v.³ It

² **§ 67.403 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration; incorrect statements.**

(a) No person may make or cause to be made --

(1) A fraudulent or intentionally false statement on any application for a medical certificate.

³ Question 18v on the FAA's medical application, titled "Conviction and/or Administrative Action History," asks applicants to report whether they have a:

History of (1) any conviction(s) involving driving while intoxicated by, while impaired by, or while under the influence of alcohol or a drug; or (2) history of any conviction(s) or administrative action(s) involving an offense(s) which resulted in the denial, suspension, cancellation, or revocation of driving privileges or which resulted in attendance at an educational or a rehabilitation

was further alleged that on the six most recent applications he should have but did not disclose his May 2002 hospital admission after the car accident in response to question 18u⁴ and the associated follow-up visits to health care professionals in response to question 19.⁵ And finally, it was alleged that on his three most recent applications respondent should have disclosed a December 2003 visit to an orthopedic surgeon in response to question 19.

The 1994 Conviction for "Refusal to Take Chemical Test"

Respondent admitted that he did not disclose any of the information at issue on his medical applications. He testified that the reason he did not disclose his conviction was because he did not read the question as requiring him to. Question 18v on the application requires applicants to report convictions involving driving while intoxicated; or

(..continued)
program.

⁴ Question 18 on the FAA's medical application, titled "Medical History," instructs applicants to check "yes" or "no" regarding whether they have ever had certain conditions or circumstances. The instructions for completion of the application state that if the answer is "yes" they are to "describe the condition and approximate date" in another space labeled "EXPLANATIONS." Subsection u of question 18 is "Admission to hospital."

⁵ Question 19 on the FAA's medical application, titled, "Visits to Health Professional Within Last 3 Years," instructs applicants to list the date, name, address and type of health professional consulted, and reason. The only permissible exclusions (listed in the instructions for completion of the application) are routine dental, eye, and FAA periodic medical examinations and consultations with employer-sponsored employee assistance programs.

which resulted in the denial, suspension, cancellation, or revocation of driving privileges; or which resulted in attendance at an educational or a rehabilitation program. The Administrator based her position on the fact that respondent's conviction included a special condition stating "alcohol counseling as directed," and on the fact that his 18-month probation period was terminated early based on the successful completion of all special conditions. However, respondent testified that, despite the language in the court order, he was never directed to attend alcohol counseling. (Transcript (Tr.) 124.) Therefore, based on his reading of the question, he was not required to report the conviction. (Tr. 128.) (Although the original charges against respondent included driving while under the influence, he claimed he had not consumed any alcohol at the time he was arrested.⁶)

The law judge found that respondent was not required to report his conviction because it did not result in attendance at an educational or rehabilitation program. (Tr. 205-6.) Thus, the law judge made an implicit credibility finding accepting respondent's testimony that, despite the language in the court order, he did not attend alcohol counseling. We agree that,

⁶ Respondent acknowledged that he was speeding and that he was pulled over at 1:45 a.m. He also acknowledged that the police officer who stopped him indicated to respondent that he smelled of alcohol, arrested him, and took him to the police station. Respondent acknowledged that he refused to take a breathalyzer test at the police station and it was this refusal that led to the conviction. (Tr. 115-19.) Respondent explained that he refused because he felt he was "being railroaded." (Tr. 120.)

absent attendance at an educational or rehabilitation program, respondent's conviction (which did not result in denial, suspension, cancellation, or revocation of his driving privileges) does not technically fall within the description of what is requested in question 18v. In light of the lack of any independent evidence that respondent attended alcohol counseling,⁷ we cannot conclude that this credibility finding was arbitrary, capricious, or inconsistent with the overwhelming weight of the evidence. Accordingly, respondent's answer to question 18v was technically not false.

The Administrator argues on appeal that, in the alternative, the conviction was reportable under item 18w, which asks whether the applicant has a history of "non-traffic convictions (misdemeanors or felonies)." However, even assuming respondent's conviction was a non-traffic conviction (which we think is questionable), the Administrator is precluded from making this argument because her complaint did not cite question 18w, and therefore did not put respondent on notice of this theory. In sum, the Administrator has not presented any reason to overturn the law judge's finding that respondent did not make a false statement by answering "no" to question 18v.

⁷ There was no corroborating evidence that such counseling was directed and no evidence that he actually attended any such counseling. Respondent's probation officer was not available to testify, but wrote a letter indicating that respondent's probation was terminated early based on completion of all special conditions. However, the letter does not explicitly state that respondent attended alcohol counseling.

Respondent's 2002 Car Accident

Regarding his non-disclosure of the hospitalization and medical visits following his May 2002 car accident, respondent testified that he did not feel this information was significant enough to disclose. He stated that he thought applicants only needed to report hospitalizations for, "something seriously wrong with you, like a disease or a surgical process or [when] you're in there for a long time." (Tr. 140.)

Medical documents showed that as a result of the car accident respondent sustained chest and shoulder injuries including a cracked sternum and a sprained shoulder. After a brief hospitalization, respondent visited doctors at least twice during the subsequent 7-month period and, in December 2002, respondent was apparently still experiencing shoulder pain described in medical records as "sharp/pinching." (See Exhibit A-20, p. 5.) While the Administrator does not contend that these injuries are per se medically disqualifying, an FAA flight surgeon testified that they would be of interest to the FAA and, if they had been disclosed, they might have prompted further questioning. In particular, he noted that such injuries might involve restricted strength or mobility and severe pain, and these factors might affect piloting ability. The FAA flight surgeon further noted that respondent had been prescribed several powerful pain medications over a period of time, suggesting that respondent was experiencing a significant amount of pain as a result of his injuries.

The Administrator also introduced evidence showing that, in April 2004, respondent filed a lawsuit against the other driver involved in the May 2002 accident in which he claimed that he had been "seriously, painfully, and permanently injured." Respondent disputed the accuracy of these statements, explaining that they were written by his attorney and indicated the lawsuit was, "an economic issue to recover lost money. It wasn't injury." (Tr. 165.)

Respondent's 2003 Knee Injury

Regarding the non-disclosure of his December 2003 visit to an orthopedic surgeon, he explained that the injury that led to this visit was an aggravation of an earlier knee injury, and that he felt this was "even less significant" than the health care he received following the car accident and that "nobody would be interested in hearing" about it. (Tr. 145.) He admitted that he was prescribed a knee brace, but he claimed he never wore it. (Tr. 181.) The FAA flight surgeon testified that a knee injury could be associated with a decrease in strength or range of motion, and could cause pain, all of which could affect piloting ability. Thus, he stated that while the condition itself was not necessarily disqualifying, if it had been revealed it could have led to further inquiries.

The Law Judge's Decision

The law judge concluded that, although respondent's answers to questions 18u and 19 may have been "wrong" (Tr. 206-7), the evidence was insufficient to show that respondent had any "false

or fraudulent intent" or any "intent to deceive or to falsify" (Tr. 209-10). The law judge also indicated that respondent did not know the statements were false. (Tr. 206-7.) Accordingly, the law judge found respondent had committed no regulatory violation and reversed the emergency order of revocation.

The Administrator appeals these findings, asserting that respondent's statements were indisputably false and that his own testimony shows that he made a conscious decision not to disclose the requested information. She further contends that respondent's assumption regarding what sort of information the questions on the form were seeking "has no rational basis" and states, "it is not up to [r]espondent to decide which medical information that is required to be disclosed on [the medical application] is significant and which is not." The Administrator argues that respondent was, "substituting his judgment for those charged with the responsibility to perform those functions," and in, "failing to report requested information to the FAA, [r]espondent effectively denied the FAA the opportunity to assess his qualifications to hold the medical certificate that was issued to him." We agree.

Intentional Falsification - Analysis

The elements of an intentionally false statement are: (1) a false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity. Hart v. McLucas, 535 F.2nd 516, 519 (9th Cir. 1976). Additional elements that must be proven to establish a fraudulent statement are that: the

representation be made (4) with the intent to deceive; and (5) with action taken in reliance on the representation. Id.

Although the complaint alleges that respondent's answers were "fraudulent or intentionally false," it does not appear from the record that the Administrator was attempting to establish a case of fraud. Intentional falsification alone is sufficient to justify revocation.⁸

Thus, the Administrator was only required to show that respondent's incorrect answers on the application were made with knowledge of their falsity. The law judge appears to have applied the wrong standard for an intentional falsification case. He referred repeatedly to the Administrator's failure to prove that respondent had "false or fraudulent intent" or an "intent" to deceive or falsify (Tr. 209-11), suggesting that he may have been holding respondent to the higher standard for fraud cases.⁹ However, the legal standard for intentional falsification does not require any showing that a respondent intended to falsify or to deceive.

We have previously declined to endorse a similar mis-

⁸ The Administrator has long taken the position, upheld by both the Board and the courts, that intentional falsification is a serious offense which in virtually all cases warrants revocation. See Olsen v. NTSB, 14 F.3rd 471, 476 (9th Cir. 1994).

⁹ Respondent himself seems to share this inaccurate perception of the applicable legal standard. When asked by the law judge how he would define a false statement, respondent answered it as, "[t]hat you're trying to hide something or you're, or you're - something that is disqualifying to you, that if you mark it down, you'll be disqualified, or something you're trying to hide, physically hide from them, from someone." (Tr. 142.)

articulation of the standard in an intentional falsification case. In Administrator v. Brassington, NTSB Order No. EA-5180 (2005), the law judge stated that the Administrator was required to prove that the respondent "intended to lie." However, we pointed out there that this articulation appeared to require the Administrator to meet one of the elements of a fraud case. It should be noted that in Brassington, the erroneous articulation of the burden of proof was an extraneous statement that was not foundational to the law judge's decision, as he made it clear elsewhere in his initial decision by comments and citation to relevant case law that he understood and had accurately applied the appropriate burden of proof for the elements of an intentional falsification case. In this case, the law judge's erroneous articulation of the Administrator's burden of proof was repeated at least eight times, and he did not cite any relevant case law to suggest he had the appropriate burden of proof in mind when evaluating the case.

However, even if the law judge did apply the proper standard, it is abundantly clear from the record that, notwithstanding the law judge's contrary view, this standard was met. Assuming that the law judge concluded that respondent did not know the answers he gave to questions 18u and 19 were false, this finding is inconsistent with the overwhelming weight of the evidence and, therefore, cannot stand.¹⁰ Respondent did not

¹⁰ We have overturned a law judge's credibility findings when we find them to be "inherently incredible" or, "inconsistent with the overwhelming weight of the evidence." See Chirino v.

claim that he mis-read questions or that he forgot about the hospitalization or visits to other health care professionals. Thus, he essentially admitted that he knew the answers to those questions were false, but he attempted to justify those false answers by arguing that the undisclosed information was not significant. In other words, respondent's defense is that his false statements did not relate to material facts. However, it is well-established that an applicant's answers to all questions on the application are material. See Administrator v. Reynolds, NTSB Order No. EA-5135 at p. 7 (2005) (citing cases). Thus, respondent's defense must be rejected and the law judge's decision must be reversed.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted;
2. The law judge's initial decision is reversed; and
3. The emergency order of revocation is affirmed.

ROSENKER, Acting Chairman, and ENGLEMAN CONNERS, HERSMAN, and HIGGINS, Members of the Board, concurred in the above opinion and order.

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NTSB, 849 F.2d 1525, 1530 (D.C. Cir. 1988) (citing cases).